



Uniform Law Commission

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

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WHY YOUR STATE SHOULD ADOPT THE UNIFORM GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT

The Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA) is a guardianship law suitable for the twenty-first century. It should be adopted in every state because:

- ***UGCOPAA encourages person-centered planning.*** Under UGCOPAA, a guardian or conservator must develop an individualized plan for each person's protection. Family and friends will receive copies of the plan and courts monitor the guardian or conservator for compliance.
- ***UGCOPAA promotes independence.*** UGCOPAA does not allow a court to impose a guardianship or conservatorship if less restrictive alternative, such as supported decision-making, would provide adequate protection. UGCOPAA also creates a mechanism for a court to order a protective arrangement instead of guardianship or conservatorship where a person's needs could be met with this less restrictive option.
- ***UGCOPAA helps leverage court resources.*** Courts can require notice of certain suspect actions to be sent to family members or friends of a person subject to guardianship, who act as the court's eyes and ears to prevent abuse.
- ***UGCOPAA protects legal rights.*** Persons subject to a guardianship or conservatorship order must be given notice of certain key rights, including the right to receive independent legal counsel and the right to have the order modified or terminated when appropriate. Guardians and conservators are limited in their ability to charge fees to oppose the alteration or termination of orders.
- ***UGCOPAA provides clear guidance to guardians and conservators.*** UGCOPAA includes a list of applicable fiduciary duties and provides clear standards for making decisions.
- ***UGCOPAA helps prevent isolation.*** A guardian may not restrict family members and friends from visiting or communicating with the person subject to guardianship for more than one week without a court order. Unless the court orders otherwise, the guardian is required under UGCOPAA to notify interested persons of any change in residence or significant change in health status.
- ***UGCOPAA was created by guardianship experts.*** Organizations involved in the drafting process include AARP, the Alzheimer's Association, the National Guardianship Association, the National Center for State Courts, the National College of Probate Judges, the ARC, the ABA Commission on Law and Aging, the National Academy of Elder Law Attorneys, and the National Disability Rights Network.

For further information about UGCOPAA, please contact ULC Chief Counsel Benjamin Orzeske at (312) 450-6621 or borzeske@uniformlaws.org.

The ULC is a nonprofit formed in 1892 to create nonpartisan state legislation. Over 350 volunteer commissioners—lawyers, judges, law professors, legislative staff, and others—work together to draft laws ranging from the Uniform Commercial Code to acts on property, trusts and estates, family law, criminal law and other areas where uniformity of state law is desirable.

**The Uniform Guardianship and Other Protective Arrangements Act (2017) and
Montana Statutes Concerning Guardianships and Conservatorships
(Sections 72-5-101 et seq.): A List of the Major Differences**
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I. Background. Montana statutes concerning guardianships and conservatorships (MCA §§ 72-5-101 et seq.) are based upon the Uniform Law Commission’s 1969 version of the Uniform Probate Code. Although Montana made some amendments to these statutes from time to time (including the addition of limited guardianships in 1981), the 1969 version of the Uniform Probate Code remains the backbone of Montana guardianship and conservatorship law.

While Montana guardian and conservatorship laws have remained relatively unchanged for 45 years, the Uniform Law Commission has promulgated two major guardianship/conservatorship acts, neither of which has been considered by the Montana Legislature to date. The first act was the Uniform Guardian and Protective Procedures Act (1997) and the most recent act is the Uniform Guardianship, Conservatorship, and other Protective Arrangements Act (2017) [“the 2017 Act” or “UGCOPAA”].

The 2017 Act reflects the recommendations of the Third National Guardianship Summit held in 2011.

II. Major differences between existing Montana law and the 2017 Act. The purpose of this outline is to list the major differences between Montana law and the 2017 Act.

1. Standard for appointing a guardian for an adult

- A. In order to appoint a guardian, the 2017 Act requires a court finding that the adult lacks the ability to meet essential requirements for physical health, safety, or self-care because the adult is “unable to receive and evaluate information or make or communicate decisions, even with appropriate supportive services, technological assistance, or supported decision making” and the adult’s “identified needs cannot be met by a protective arrangement instead of guardianship or other less restrictive alternative.” UGCOPAA § 301.
- B. Existing Montana law requires a finding that the adult is an “incapacitated person”. MCA § 72-5-101 (1) defines “incapacitated person” as:
 - any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, except minority, to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning the person or which cause has

so impaired the person's judgment that the person is incapable of realizing and making a rational decision with respect to the person's need for treatment.

2. Terminology

The 2017 Act utilizes different terms than those found in existing Montana law.

2017 Act	Existing Montana law
Adult subject to guardianship	Incapacitated person
Individual subject to a conservatorship	Protected person
Minor subject to guardianship	Ward
Respondent	Alleged incapacitated person (guardianship)
Respondent	Person to be protected (conservatorship)

3. Less Restrictive Arrangements

- A. The 2017 Act prohibits courts from issuing guardianship or conservatorship orders when a less-restrictive alternative is available, such as supported decision-making, technological assistance, or an order authorizing a single transaction (UGCOPAA §§ 301 and 401).
- B. Existing Montana law permits courts to issue a “protective order” in lieu of a conservatorship. See MCA §§ 72-5-409 and 72-5-422. However, unlike the 2017 Act, existing Montana law does not require courts to make an express finding that a protective order or other less restrictive arrangement would satisfy the respondent’s identified needs. Similarly, existing Montana law permits courts to issue a “limited guardianship” in lieu of a full guardianship. See MCA § 72-5-316. However, there is no requirement that the court make an express finding that such a limited guardianship or other less restrictive arrangement would satisfy the respondent’s needs.

4. Burden of Proof

- A. The 2017 Act requires the court to find that there is “clear-and-convincing” evidence of the standard noted in 1.A. above prior to the appointment of a guardian or a conservator. UGCOPAA §§ 301 and 401. However, this “clear and convincing” evidence standard does not apply to guardianship terminations. UGCOPAA § 319.
- B. Existing Montana law requires the court to be “satisfied” that the person for whom a guardianship is sought is incapacitated pursuant to the standard noted in 1.B. above prior to the appointment of a guardian. MCA § 72-5-316. Although Montana guardianship statutes do not specifically set forth the required evidentiary standard necessary to satisfy the court, the party seeking a guardianship appointment would have to satisfy the court by a “preponderance of the evidence”, which is the standard generally applicable to civil matters. See MCA § 26-1-403(1).

5. Other Procedural Rights

There are other procedural rights in the 2017 Act that are not part of existing Montana law. In my opinion, the following are the most important.

A. Prior Notice of hearing.

- The 2017 Act. Prior notice of a hearing is required. UGCOPAA §§ 203, 303, and 403. Notice of a hearing must be in at least 16-point font, in plain language, and, to the extent feasible, in a language in which the person to be notified is proficient. UGCOPAA § 113 (c).
- Existing Montana law. MCA § 72-5-314 also requires pre-hearing notice in a proceeding for the appointment of a guardian of a protected person. However, there are no express language or minimum font requirements.

Parents of an unmarried minor may appoint a guardian in a testamentary instrument (will) and the appointment is effective upon acceptance of that appointment in a probate proceeding without a hearing. MCA § 72-5-211. However if there is no testamentary appointment, a hearing will be held upon a petition for the appointment of a guardian of a minor. In this circumstance, prior notice of a hearing is required. MCA § 72-5-225. There are no express language or minimum font requirements.

MCA § 72-5-403 requires pre-hearing notice in a conservatorship proceeding and there are no express language or minimum font requirements.

B. Notice of key rights.

- The 2017 Act. Respondents must be given notice of key rights, including the right to receive independent legal counsel and the right to have the guardianship order modified or terminated when appropriate. UGCOPAA §§ 303 and 311.
- Existing Montana law. Although the alleged incapacitated person is entitled to be represented by counsel and the incapacitated person may petition for a termination of the guardianship, existing Montana law does not expressly require notice of these rights. See MCA §§ 72-5-315 and 72-5-325.

C. Attendance at the hearing.

- The 2017 Act. Adult respondents are required to attend the hearing if at all possible, unless the respondent consistently and repeatedly refuses after having been fully informed of the right to attend and the potential consequences of not attending. UGCOPAA §§ 307 and 408.
- Existing Montana law. Although the alleged incapacitated person is entitled to be present at the hearing, existing Montana law does not include express provisions requiring attendance. See MCA § 72-5-315.

6. Individualized Plan

- A. The 2017 Act requires guardians and conservators file an individualized plan within 60 days of appointment (UGCOPAA §§ 316 and 419). A guardian's plan must include information about living arrangements, social and educational activities, names of persons with whom the person subject to a guardianship has a close personal relationship, the nature and

frequency of the guardian's visits, goals for the adult, and a listing of the amount the guardian proposes to charge for each service the guardian renders. A conservator's plan must include a budget containing projected expenses and resources, the amount the conservator anticipates charging, the conservator's plan to involve the individual in conservatorship management, and an estimate of the conservatorship's duration.

- B. Existing Montana law does not require the conservator or guardian to file any plan. Like the 2017 Act, conservators are required to file an initial inventory and file annual accounts. See MCA §§ 72-5-424 and 72-5-438.

7. Guidance to guardians and conservators

- A. The 2017 Act includes extensive lists of applicable fiduciary duties and provides clear standards for making decisions. For example, a guardian must make decisions the guardian reasonably believes the adult would make if able, unless doing so would cause harm to the adult. To the extent feasible, a guardian for an adult must promote the adult's self-determination, encourage the adult's participation in decisions, and take into account the adult's values and preferences. See UGCOPAA § 313 for these and additional duties and decision-making standards applicable to guardianships. Similar guidance is provided for minors subject to guardianships and conservators. (UGCOPAA §§ 209 and 418).
- B. Existing Montana law lacks comparable guidance and decision-making standards. See MCA §§ 72-5-231, 72-5-321, and 72-5-428.

8. Monitoring of guardians and conservators

- A. The 2017 Act. The spouse and adult children of an adult subject to a guardianship will receive copies of the individualized plan filed with the court unless the court determines such notice would be contrary to the adult's preferences or prior limitations or is not in the best interest of the adult (UGCOPAA §§ 316 and 310). The same parties shall also receive annual reports required under UGCOPAA § 317.
- B. Existing Montana law, as noted, does not require guardians to file an individualized plan. In fact, guardians of minors are not required to make reports. See MCA § 72-5-231. Guardians of incapacitated persons are required to file annual reports, with copies to the person's parent, child, or sibling, only if requested. See MCA § 72-5-321. Although conservators are required to file an annual account, there is no requirement to send copies to the spouse or adult children. See MCA § 72-5-438.

9. Guaranteed visitation and communication

- A. The 2017 Act prohibits a guardian from restricting family members and friends from visiting or communicating with the person subject to guardianship for more than one week without a court order. (UGCOPAA § 315). Furthermore, unless the court orders otherwise, the guardian is required to notify interested persons of any change in residence or significant change in health status. (UGCOPAA § 310).

- B. Existing Montana law. A guardian has the same powers of a parent and therefore may restrict family and friends from visiting the ward or protected person without limitation. See MCA § 72-5-231 and MCA § 72-5-321. As to communication, MCA § 72-5-231 requires a report on the condition of a ward only pursuant to a court order after a petition. MCA § 72-5-321 requires a guardian of a protected person to file a report on the person's condition only if requested by the person's parent, child, or sibling.

III. Guidance to Guardians and Conservators and their Attorneys. The Uniform Law Commission creates substantial materials that assist in the interpretation of its acts. If UGCOPAA is enacted in Montana without significant modification, Montana guardians and conservators, their advisors, and the courts can utilize substantial introductory comments (attached), the soon-to-be published section-by-section comments, and future case law from other jurisdictions to assist in interpreting the law.

A copy of the entire act may be accessed online.

<http://www.uniformlaws.org/Act.aspx?title=Guardianship,%20Conservatorship,%20and%20Other%20Protective%20Arrangements%20Act>